

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE,

Plaintiff,

v.

SSA TERMINALS LLC,

Defendant.

CASE NO. C11-1617-JCC

ORDER

This matter comes before the Court on the parties' stipulation for a proposed protective order (Dkt. No. 59). The parties had previously submitted a stipulated protective order (Dkt. No. 48), which the Court had declined to consider until being provided with a redlined version (Dkt. No. 50). The parties have now submitted a redlined version, which the Court considers. The Clerk is directed to TERMINATE the previous stipulation (Dkt. No. 48.) Having thoroughly considered the parties' briefing and the relevant record, the Court GRANTS the stipulation and ORDERS the terms of the protective order (Dkt. No. 59):

1. PURPOSES AND LIMITATIONS.

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. The parties agree that the improper use or dissemination of confidential, proprietary, or private information may cause severe

1 personal, proprietary, or business damage to one or more of the parties or to involved third
2 parties. Accordingly, the parties hereby stipulate to and petition the court to enter the following
3 Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR
4 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the
5 protection it affords from public disclosure and use extends only to the limited information or
6 items that are entitled to confidential treatment under the applicable legal principles, and it does
7 not presumptively entitle parties to file confidential information under seal.
8

9 2. CONFIDENTIAL" MATERIAL.

10 "Confidential" material shall include the following documents and tangible things produced or
11 otherwise exchanged: Any information, document, electronically stored information, or thing
12 that contains or is a trade secret or other confidential research, development, or commercial
13 information as those terms are used in Federal Rule of Civil Procedure 26(c)(1)(G) that have not
14 been made public, and information that a party is under a legal duty to maintain in confidence,
15 provided that such information, document, electronically stored information, or thing is
16 designated as set forth herein. Any Confidential Information may be designated as
17 "CONFIDENTIAL."
18

19 3. SCOPE.

20 The protections conferred by this agreement cover not only confidential material (as defined
21 above), but also (1) any information copied or extracted from confidential material; (2) all
22 copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
23 conversations, or presentations by parties or their counsel that might reveal confidential material.
24 However, the protections conferred by this agreement do not cover information that is in the
25 public domain or becomes part of the public domain through trial or otherwise.
26

1 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

2 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
3 or produced by another party or by a non-party in connection with this case only for prosecuting,
4 defending, or attempting to settle this litigation. Confidential material may be disclosed only to
5 the categories of persons and under the conditions described in this agreement. Confidential
6 material must be stored and maintained by a receiving party at a location and in a secure manner
7 that ensures that access is limited to the persons authorized under this agreement.
8

9 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
10 ordered by the court or permitted in writing by the designating party, a receiving party may
11 disclose any confidential material only to:

12 (a) the receiving party's counsel of record in this action, as well as employees
13 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

14 (b) the officers, directors, and employees (including in house counsel) of the
15 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
16 agree that a particular document or material produced is for Attorney's Eyes Only and is so
17 designated;
18

19 (c) experts and consultants to whom disclosure is reasonably necessary for
20 this litigation and who have signed the "Acknowledgement and Agreement to Be Bound"
21 (Exhibit A);

22 (d) the court, court personnel, and court reporters and their staff;

23 (e) copy or imaging services retained by counsel to assist in the duplication of
24 confidential material, provided that counsel for the party retaining the copy or imaging service
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1 instructs the service not to disclose any confidential material to third parties and to immediately
2 return all originals and copies of any confidential material;

3 (f) during their depositions, witnesses in the action to whom disclosure is
4 reasonably necessary and who have signed the "Acknowledgement and Agreement to Be Bound"
5 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
6 transcribed deposition testimony or exhibits to depositions that reveal confidential material must
7 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
8 under this agreement;
9

10 (g) the author or recipient of a document containing the information or a
11 custodian or other person who otherwise possessed or knew the information.

12 (h) a third-party neutral retained by the parties to assist in resolution of the
13 Lawsuit.

14 Counsel revealing "Confidential" information to such persons shall be responsible for
15 maintaining a list of all persons to whom such "Confidential" information is disclosed, and for
16 retaining the originals of the signed Exhibit A agreements. For good cause shown, such list and
17 agreements shall be available for inspection by counsel for the other party upon prior written
18 agreement of the parties or Order of this Court.
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20 4.3 Filing Confidential Material. Before filing confidential material or discussing or
21 referencing such material in court filings, the filing party shall provide no less than seven days
22 advance written notice of its intent to file specified "Confidential" information to all other parties
23 and confer with the designating party to determine whether the designating party will remove the
24 confidential designation, whether the document can be redacted, or whether a motion to seal or
25 stipulation and proposed order is warranted. Local Civil Rule 5(g) sets forth the procedures that
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1 must be followed and the standards that will be applied when a party seeks permission from the
2 court to file material under seal.

3 5. DESIGNATING PROTECTED MATERIAL

4 5.1 Exercise of Restraint and Care in Designating Material For Protection. Each
5 party or non-party that designates information or items for protection under this agreement must
6 take care to limit any such designation to specific material that qualifies under the appropriate
7 standards. The designating party must designate for protection only those parts of material,
8 documents, items, or oral or written communications that qualify, so that other portions of the
9 material, documents, items or communications for which protection is not warranted are not
10 swept unjustifiably within the ambit of this agreement.

12 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
13 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
14 unnecessarily encumber or delay the case development process or to impose unnecessary
15 expenses and burdens on other parties) expose the designating party to sanctions.

17 If it comes to a designating party's attention that information or items that it designated
18 for protection do not qualify for protection, the designating party must promptly notify all other
19 parties that it is withdrawing the mistaken designation.

20 5.2 Manner and Timing of Designations. Except as otherwise provided in this
21 agreement, or as otherwise stipulated or ordered, disclosure or discovery material that qualifies
22 for protection under this agreement must be clearly so designated before or when the material is
23 disclosed or produced. If a party obtains discovery in this action from any third party source,
24 any party may mark such discovery "Confidential" pursuant to this section by notifying all
25 parties in writing within ten days of receipt of the third-party discovery of the specific documents
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1 or information which should be treated as "Confidential" thereafter. All discovery received from
2 non-parties shall be treated as "Confidential" for ten days following receipt.

3 (a) Information in documentary form: (e.g., paper or electronic documents
4 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
5 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that
6 contains confidential material. If only a portion or portions of the material on a page qualifies
7 for protection, the producing party also must clearly identify the protected portions (e.g., by
8 making appropriate markings in the margins).
9

10 (b) Testimony given in deposition or in other pretrial or trial proceedings: the
11 parties must identify on the record, during the deposition, hearing, or other proceeding, all
12 protected testimony, without prejudice to their right to so designate other testimony after
13 reviewing the transcript. Any party or non-party may, within fifteen days after receiving a
14 deposition transcript, designate portions of the transcript or exhibits thereto, as confidential.
15

16 (c) Other tangible items: the producing party must affix in a prominent place
17 on the exterior of the container or containers in which the information or item is stored the word
18 "CONFIDENTIAL". If only a portion or portions of the information or item warrant protection,
19 the producing party, to the extent practicable, shall identify the protected portion(s).

20 5.3 Inadvertent Failures to Designate. In the event that a party inadvertently fails to
21 stamp or otherwise designate a record as "Confidential" at the time of its production, that party
22 will have ten business days after discovery of the error to so stamp or otherwise designate the
23 record. If timely corrected, an inadvertent failure to designate qualified information or items
24 does not, standing alone, waive the designating party's right to secure protection under this
25 agreement for such material. Upon timely correction of a designation, the receiving party must
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1 make reasonable efforts to ensure that the material is treated in accordance with the provisions of
2 this agreement.

3 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS.

4 Any party who wishes to challenge another party's designation of information as
5 "Confidential" may proceed at any time as follows:

6 (a) Counsel for such parties shall confer in a good faith effort to resolve by
7 agreement any differences as to the use or designation of information as "Confidential"
8 information;
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10 (b) Failing agreement of the parties, the objecting party will notify the
11 proponent of the confidentiality of the document in writing of the objection, the basis therefore,
12 and shall identify by category or document number the information as to which relief is sought;

13 (c) Within ten business days after receipt of such written notice, the party
14 designating such information as "Confidential" may file a motion with the Court to establish
15 the confidentiality of any such document, which motion shall:
16

17 (i) Demonstrate with particularity with respect to each challenged
18 item of "Confidential" information the reasons why such information has been properly
19 designated as "Confidential" consistent with Federal Rule of Civil Procedure 26(c)(1); and

20 (ii) Demonstrate why the disclosure or use of the particular
21 information might result in harm or injury.

22 (d) If a motion is timely made as provided in Paragraph 6(c), the
23 designation of confidentiality shall remain in full force and effect and the information shall
24 continue to be accorded the treatment required by this Order, until the motion with respect to
25 the particular designation of confidentiality is ruled upon by the Court; and
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1 (e) If the party designating such information as “Confidential” fails to
2 timely make a motion pursuant to Paragraph 6(c) after a party provides written notice pursuant
3 to Paragraph 6(b), the information shall cease to be treated as “Confidential” information
4 under this Order. A challenge to the propriety of a designation of confidentiality may be
5 made at any time and need not be made at the time the designation is made.

6 6.1 Timing of challenges. Unless a prompt challenge to a designating party's
7 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary
8 economic burdens, or a significant disruption or delay of the litigation, a party does not waive its
9 right to challenge a confidentiality designation by electing not to mount a challenge promptly
10 after the original designation is disclosed.

12 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
13 regarding confidential designations without court involvement pursuant to paragraph 6(a). Any
14 motion regarding confidential designations or for a protective order must include a certification,
15 in the motion or in a declaration or affidavit, that the movant has engaged in a good faith meet
16 and confer conference with other affected parties in an effort to resolve the dispute without court
17 action. The certification must list the date, manner, and participants to the conference. A good
18 faith effort to confer requires a face-to-face meeting or a telephone conference.

20 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
21 intervention, the designating party may file and serve a motion to retain confidentiality under
22 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
23 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
24 made for an improper purpose (e.g. to harass or impose unnecessary expenses and burdens on
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other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the court rules on the challenge.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL," that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

It will be a violation of this Order for any party to this case, or his or her counsel, to disclose "Confidential" information except as set forth in this Order. If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and (d) request that

1 such person or persons execute the "Acknowledgement and Agreement to Be Bound" that is
2 attached hereto as Exhibit A.

3 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
4 MATERIAL

5 When producing party gives notice to receiving parties that certain inadvertently
6 produced material is subject to a claim of privilege or other protection, the obligations of the
7 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
8 provision is not intended to modify whatever procedure may be established in an e-discovery
9 order or agreement that provides for production without prior privilege review. Parties shall
10 confer on an appropriate non-wavier order under Fed. R. Evid. 502.

12 10 NON TERMINATION AND RETURN OF DOCUMENTS

13 Within 30 days after the termination of this action, including all appeals, each receiving
14 party must return all confidential material to the producing party, including all copies, extracts
15 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
16 destruction.
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18 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
19 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
20 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
21 work product, even if such materials contain confidential material.

22 The confidentiality obligations imposed by this agreement shall remain in effect until a
23 designating party agrees otherwise in writing or a court orders otherwise.
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25 11. Nothing in this Order precludes any party or their attorney(s) from showing records or
26 information designated as "Confidential" information to an individual who either prepared or

1 reviewed the records before the filing of this action, or from disclosing or using, in any manner
2 consistent with the spirit of this Order, records from the party's own files that the party itself has
3 designated as "Confidential" information.

4 12. Nothing in this Order shall bar, or otherwise restrict, any attorney in this matter from
5 rendering advice to his or her client with respect to this litigation or doing anything reasonably
6 necessary to prosecute or defend this litigation.

7 13. Nothing in this Order may be construed to prohibit a party from seeking actual damages
8 against a party for the intentional wrongful disclosure of any "Confidential" information, the
9 disclosure of which is prohibited by this Order. If any person breaches the terms of this Order,
10 the parties will have the right to seek and obtain all judicial relief as may be appropriate,
11 including damages and equitable or injunctive relief, and will be entitled to recover from the
12 breaching party any attorneys' fees, costs, and expenses incurred in order to obtain such relief.

13 14. Nothing in this Order shall preclude a party from pursuing a protective order or moving
14 to seal any portion of the Court file at any time if such action is deemed necessary by either party
15 in either party's sole discretion.
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17 15. Insofar as the provisions of this Order restrict the use of "Confidential" information, this
18 Order will continue to be binding after the conclusion of this litigation.
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DATED this 5th day of August 2014.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE